86 1942

No.

Supreme Court, U.S.
FILED
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CLERK

IN THE

United States Supreme Court

OCTOBER TERM, 1986

DAVID JORDAN, et al.,

Petitioners

v.

NORTH MISSISSIPPI RURAL LEGAL SERVICES, INC., et al.,

Respondents

On Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLIE J. PERKINS, SR.
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ATTORNEY FOR PETITIONERS

QUESTIONS PRESENTED

1. Whether the "clearly erroneous" standard for review of FRCP 52 (a) is applicable to the district court's factual finding that a former staff attorney was entitled to an award of fees in a case authorized by the Executive Director pursuant to 45 C.F.R. Sections 1604.3 and 1604.5 (outside uncompensated practice)?

2. Whether equity demands that a former legal services staff attorney be awarded fees for representation of a case on his own time on behalf of ineligible clients and plaintiffs' class in detrimental reliance upon authorization from the program Executive Director?

LIST OF PARTIES

1. PETITIONERS

David Jordan
Robert Sims
James Moore
Estate of Sammie Chestnut, Deceased

2. RESPONDENTS/INTERVENORS

North Mississippi Rural Legal Services, Inc.
John Johnson, Chairman of Board of Directors

Leonard McClellan, Acting Executive Director

3. DEFENDANTS

City of Greenwood, Mississippi
Mayor Louis Fancher
David Jordan, Councilman
Joseph Curtis, Councilman
James Moore, Councilman
Beverly Smith, Councilwoman
Orlando Fratesi, Councilman
Harold Sayle, Councilman
Don Short, Councilman

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1. The defendants did not participate in this matter on appeal to the United States Court of Appeals for the Fifth Circuit and may otherwise be not interested in this matter.

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OPINIONS BELOW

The opinion of the District Court for the Northern District of Mississippi (Greenville Division), unreported, which awarded fees to Willie J. Perkins, Sr., the former legal services staff attorney and attorney for the ineligible legal services clients is set out in Appendix "A".

The opinion of the United States Court of Appeals for the Fifth Circuit which reversed the District Court's opinion is included as Appendix "B".

Also, the opinion of the Fifth Circuit which treated petitioners' suggestion for rehearing en banc as a petition for panel rehearing and denied the same is included as Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth

Circuit reversing and remanding the decision of the district court, was entered on February 2, 1987. Petitioners filed a suggestion for Rehearing En Banc on February 16, 1987. The Fifth Circuit treated this suggestion for rehearing en banc as a petition for panel rehearing and entered its per curiam opinion on March 6, 1987, denying the same; Appendix "C" attached.

This petition is being docketed in this Court within 90 days of the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U. S. C.-Section 2101 (C).

STATUTES AND REGULATIONS INVOLVED

45 C.F.R. 1604; 45 C.F.R. 1611.3 (d); and Federal Rules of Civil Procedure 52 (a). (Included verbatim as Appendix "D").

STATEMENT OF THE CASE

This action was filed on May 6, 1977, by lead plaintiff David Jordan and three other named plaintiffs, as a class action, challenging the Greenwood Commission form of government as being, inter alia, violative of Section Two of the Voting Rights Act.

On July 25, 1984, the lower Court entered its Judgment and Memo of Decision striking down the at-large election scheme and ordering the adoption of single member districts. On December 5, 1984, the district Court entered its final order adopting the new election scheme and reserving the allowance of attorney's fees and expenses. Thereafter, the district Court entered its Supplemental Judgment on May 7, 1985, to designate seven precleared polling places for the conducting of city

elections. On October 15, 1985, plaintiffs filed their Motion for a Award of Attorney's fees and Litigation Expenses and their Motion for extension of time to submit supporting documentation. That on the same date, Curley Emanuel Smith, Executive Director of North Mississippi Rural Legal Services, without the knowledge or approval of any counsel of record, hand delivered and filed a Motion for Assessment of Fees and Costs with the clerk and a Motion for Leave to Supplement Plaintiffs' Motion for Assessment of Attorneys' fees and Costs. The district Court while acting under the impression that the Smith's motion was filed with the knowledge, consent or approval of plaintiffs' counsel of record granted an extension of fifteen (15) days for supplementation. At the time of the filing of Smith's motion, the plaintiffs and defen-

dants aided by the Court, agreed upon $50,000.00 as a settlement for fees and expenses. On October 31, 1985 defendants filed their petition for the Court to receive and disburse a fee award. On the same date, the district Court entered its Order approving the $50,000.00 as reasonable fees and costs, and scheduled a hearing to resolve the dispute over attorneys' fees. At the hearing on November 8, 1985, the district Court, after hearing all evidence, again approved the $50,000.00 as reasonable fees and expenses. Further, the Court ordered that $36,000.00 of this amount be paid to Perkins, individually and free of any claims of NMRLS, that $2,000.00 be paid to Leonard McClellan and NMRLS, that $2,000.00 be paid to Solomon Osborne and NMRLS, and that $10,000.00 and all accrued interest to be paid to the joint order of Perkins,

McClellan, Osborne and NMRLS in reimbursement of litigation expenses, said award to be the property of NMRLS. On November 13, 1985, NMRLS filed a motion with the Court for reconsideration of the order entered on November 8, 1985, and a motion to stay disbursement of the funds tendered to the Court by the City of Greenwood. On November 14, 1985, the Court issued its order staying the disbursement of funds. On November 22, 1985, Attorney Billy Bowman filed the Defendants' Response to Motion for Reconsideration. On November 15, 1985, Perkins filed Plaintiffs' Response in Opposition to NMRLS and Curley Smith's Motion for Reconsideration. On December 12, 1985, the Court entered its order denying NMRLS' Motion for Reconsideration. On January 2, 1986, NMRLS filed its Notice of Appeal from the district Court's order dated December

12, 1985. On February 2, 1987, the three Judge panel of this Court entered its opinion reversing and remanding the case to the district court. Plaintiffs file their petition for rehearing en banc which was denied on March 6, 1987.

This case directly poses the important question of whether FRCP 52(a) applies to the factual findings of the district court to award attorney's fees to a former legal services staff attorney based upon his granted authorization to engage into outside uncompensated practice pursuant to 45 C.F.R. Sections 1604.3 and 1604.5. The Fifth Circuit panel reversed the factual findings of the district court without applying the "clearly eroneous" standard of review.

Also, this case directly imposes the important question of whether NMRLS, a legal service program, the "intervenor" can

claim representation of and fees on behalf of ineligible clients, in non compliance with 45 C.F.R. Section 1611.3 (d) to the detriment of a former legal service attorney who had approval from prior Executive Director to handle this case as his private case. This case was commenced on May 6, 1977 by the four named plaintiffs, David Jordan, Robert Sims, James Moore and Sammie Chestnut. All of the named plaintiffs except Sammie Chestnut were ineligible clients of NMRLS and were represented by private attorneys. The eligible client, Plaintiff Sammie Chestnut was represented by NMRLS in a joint effort with the counsels for the private plaintiffs to defray costs. A division arose between private counsel and the non eligible clients and authorization from two prior Executive Directors of NMRLS was given to Willie Perkins to engage into

uncompensated outside practice of law on behalf of the three (3) noneligible clients and the plaintiffs' class. Pursuant to Section 45 C.F.R. 1604.3, the Executive Director had authority to grant the privilege to Perkins and there is no requirement of a written authorization under this Section. This authorization was made known to Leonard McClellan, Staff Attorney, and one of the Counsels of record. Also, Staff Attorney Solomon Osborne, another attorney of record, was aware of Perkins' intent to get approval to handle the case as a private one. Further, there was a special close relationship between Perkins and David Jordan wherein Perkins had represented Jordan on other occassions as a close friend.

Plaintiff Sammie Chestnut, an elderly person in her late seventies or early eighties, was not an active plaintiff in

the lawsuit. Mrs. Chestnut died in 1984 before this case was on remand from the Fifth Circuit. Further, Plaintiff Chestnut would not have been an adequate Rule 23 (b) (2) class representative and the case was of a nature and magnitude that it needed leaders like David Jordan, Robert Sims and James Moore to get the involvement of the Black community. Plaintiff Chestnut did not testify or attend the trial in this matter.

There was no secret or objection made to the fact that Perkins had an agreement with two former Executive Directors, Wilhelm Joseph and Jesse Pennington to represent the ineligible clients. It was on this basis that Perkins proceeded to represent the Principal Jordan Plaintiffs and the class. Perkins was primarily responsible for discovery motions, preparing for trial and

spent an estimated 90% of his time at nights, weekends, on Sundays and holdidays and had a basic responsibility for handling the case on appeal to the Fifth Circuit and on all proceedings following remand leading up to a successful conclusion of the case when the Court invalidated the commission form of government based upon the application of an amended Section 2 principles to the lengthy record presented.

Perkins had an agreement at the outset with Jesse Pennington, and Wilhelm Joseph, successive Executive Directors of NMRLS, that his representation on behalf of Messrs. Jordan, Sims and Moore would be outside practice of law within the meaning of 1604.2 (b) of NMRLS regulations. Pennington and Joseph determined that Perkins' handling of the case was not inconsistent with Perkins' full-time responsibilities at NMRLS. It was

understood by Pennington, Joseph and Perkins, that Perkins had no fee arrangement with Jordan, Sims and Moore, and that Perkins was representing the ineligible clients as a public service to the community. Because of his friendship with Jordan, and the nature of the litigation, Perkins expected his services to be uncompensated, except that a fee might be ultimately awarded by the Court to prevailing parties pursuant to 42 U.S.C. 1988. Perkins' actions in this respect may be properly classified as "uncompensated outside practice" under 1604.5.

On February 13, 1985, Perkins left the employment of NMRLS and entered into private practice at Greenwood. Prior to entering private practice, Perkins submitted a list of legal services cases to continue to work on at a reduced rate pursuant to the Private Attorney Involve-

ment (PAI) Plan of NMRLS. The Jordan case was not included on the list of cases because Perkins never deemed the case as a legal service case.

Perkins rendered significant service in settlement talks after February 13, 1985, when he was engaged in private practice and no longer an employee of NMRLS. Further his effort amounted to 90% of the time and responsibility for managing the litigation. Also, after Perkins left NMRLS, he devoted services toward this Court entering its Supplemental Judgment on May 7, 1985, to designate seven precleared polling places for the conducting of city elections.

The lower court found $50,000.00 as reasonable fees and costs and ordered $36,000.00 payable to Perkins, $2,000.00 payable to McClellan and NMRLS, $2,000.00 payable to Osborne and NMRLS and $10,000.00

payable to NMRLS as reimbursement of litigation expenses. The Fifth Circuit panel reversed the decision of the lower court, barring any fees to Perkins during his tenure as a legal services attorney.

THE QUESTIONS ARE SUBSTANTIAL

This case directly poses the prima facie question of the applicability of Rule 52 (a) clearly erroneous standard to the factual finding of the district Court awarding fees to a former legal services attorney authorized to engage into outside uncompensated practice pursuant to 45 CFR 1604.3 and 1604.5. The panel of the Fifth Circuit reversed the ruling of the lower court without applying the clearly erroneous standard of Rule 52 (a). Petitioners contend that the panel's decision is contrary to the following decisions of this court:

Pullman-Standard v. Swint, 456 US 273, 72LED 2d 66, 102 S. Ct. 1781 (1982);

Phyllis A. Anderson v. City of Bessemer City, North Carolina, 470 US _____, 84 LED 2d 518 106 S. Ct. _____ (1985);

Dennison Manufacturing Company v. Panduit Corporation, 475 US _____, 89 LED 2d 817, 106 S. Ct. _____ (1986); and their progenies.

The consideration of this court is necessary to secure and maintain uniformity of decisions throughout the circuits.

Also, this case raises the important equity issue of detriment reliance and allocation of the burden or blame to the legal services program which granted the authority to engage into outside uncompensated practice to the former attorney.

I. WHETHER THE DISTRICT COURT'S FINDING THAT A FORMER STAFF ATTORNEY WAS ENTITLED TO AN AWARD OF FEE IN A CASE AUTHORIZED BY THE EXECUTIVE DIRECTOR PURSUANT TO 45 C.F.R. SECTIONS 1604.3 AND 1604.5 (OUTSIDE UNCOMPENSATED PRACTICE) WAS A FACTUAL ISSUE SUBJECT TO THE "CLEARLY ERRONEOUS" STANDARD OF FRCP 52 (a).[2]

Petitioners contend that the finding

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[2] A copy of this regulation appears in Appendix "D".

of the district Court that Perkins, a former staff attorney, was entitled to an award of fee for his representation of the ineligible clients and plaintiffs' class pursuant to authorization by the program prior Executive Directors, to engage into outside uncompensated practice, was a factual issue subject to the clearly erroneous standard of Rule 52 (a). The panel of the Fifth Circuit erred in its opinion that the district court's conclusion that Perkins' representation of the ineligible named plaintiffs was "uncompensated outside practice" was a legal conclusion subject to de novo review on appeal. See Appendix "B". The panel in effect ignored FRCP 52 (a) and substituted its view on the ultimate fact for that of the district Court. The district Court made several factual findings predicated to its finding of the ultimate fact that Perkins' representation of the ineligible

named plaintiffs was uncompensated outside practice. See Appendix "A". The district Court found that Perkins had authorization from two prior Executive Directors to represent the three ineligible named plaintiffs who represented the class. The The district Court found that Perkins did not have a fee agreement with the ineligible clients, and that all parties understood he would be uncompensated for his services, except that he might be granted a fee as the prevailing party, pursuant to 42 U.S.C. Section 1988.

A determination was made by the Executive Directors, that Perkins, was representing the three ineligible clients in his capacity as their friend and as a service to the community. They further determined that such representation was not inconsistent with his full-time duties as an employee of NMRLS, since his work on behalf of the ineligible clients would be done on nights, Sundays, and weekends.

Further, the district Court found that it is clear that an attorney employed by a Legal Services Program, may be granted the authority to engage in both, the compensated and uncompensated outside practice of law, by a Program Executive Director. See 45 C.F.R. 1604.2 (a) and (b); 45 C.F.R. 1604.3; 45 C.F.R. 1604.4 (a) and (b); 45 C.F.R. 1604.5 (a), (b) and (c). See Appendix "D".

Based upon these findings, the district Court reached the ultimate conclusion that Perkins' representation was uncompensated outside practice and was valid. The panel decided to the contrary without an explanation as to how the district Court's factual findings were clearly erroneous. The decision of the panel is in conflict with precedents of this Court. See Pullman-Standard v. Swint, 456 US 273, 72 LED 2d 66, 102 S Ct. 1781 (1982); Phyllis A. Anderson v. City of Bessemer City, North Carolina, 470 US

_____, 84 LED 2d 518, 106 S. Ct. _____ (1985); and Dennison Manufacturing Company v. Panduit Corporation, 475 US _____, 89LED 2d 817, 106 S Ct. _____ (1986).

In Pullman-Standard, Supra., this Court decided that the Fifth Circuit Court of Appeals' reversal of the lower Court's ruling as to legality of seniority system under 42 USCS Section 2000 e-2 (h) was erroneous in view of the Court's independent determination of allegations of discrimination. This Court further held that the question of whether the differential impact of a seniority system reflects an intent to discriminate on account of race is a pure question of fact, and is neither a question of law nor a mixed question of law in fact, so that the question is subject to the "clearly erroneous" standard of Rule 52. 42 LED 2d at 79.

In City of Bessemer City, Supra., this Court ruled that the Fourth Circuit Court

of Appeals misapplied the "clearly erroneous" standard of review in overturning the lower Court's finding of sex discrimination. This Court further stated as follows:

> "Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52 (a)..."
>
> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court.- "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be

clearly erroneous."
84 LED at 528.

In Dennison Manufacturing Company, Supra., a per curiam opinion, this Court remanded a patent case where the federal court of appeals, reversed the lower court's holding that the patents were invalid for obviousness, without indicating its views as to applicability of Rule 52 (a)'s "clearly erroneous" standard for reviewing findings of fact. This Court stated as follows:

"The Federal Circuit, however, did not mention Rule 52 (a), did not explicitly apply the clearly erroneous standard to any of the District Court's findings on obviousness and did not explain why, if it was of that view, Rule 52 (a) had no applicability to this issue. We therefore lack an adequate explanation of the basis for the Court of Appeals' judgment: most importantly, we lack the benefit of the Federal Circuit's informed opinion on the complex issue of the degree to which the obviousness determination is one of fact. In the absence of an opinion clearly setting forth the views of the Court of Appeals on these matters, we are not prepared to give plenary consideration to petitioner's claim that the decision below cannot be squared with Rule 52 (a). Instead, we grant the petition for certiorari, vacate the judgment, and remand the case to the Court of Appeals for

further consideration in light of Rule 52 (a)."

89 LED 2d at 822.

This Court has held or recognized that the "clearly erroneous" standard of Rule 52 (a) applies broadly to all categories of factual findings. See generally Pullman-Standard, Supra., (issue of intent under Title VII is a factual finding); Rogers v. Lodge, 73 LED 2d 1012, 102 S Ct. 3272, (1982), reh den 74 LED 2d 160, 103 S. Ct. 198, (issue of intent in election case under VRA is a factual finding); Commissioner v. Duberstein, 363 US 278, 4 LED 2d 1218, 80 S Ct. 1190 (1960), (Rule 52 (a) (applies to factual inferences from undisputed basic facts and to ultimate finding of "gift" under Internal Revenue Code); U. S. v. Yellow Cab Co., (1949) 338 US 338, 94 LED 2d 150, 70 S Ct. 177 (issue as to intent or motive or as to the existence of a conspiracy in an antitrust case is a factual finding);

Graver Tank & Mfg. Co. v. Lind Air Products Co., (1941) 336 US 271, 93 LED 672, 69 S Ct. 535 (questions as to patent infringement were factual issues to which Rule 52 (a) applied); Inwood Laboratories, Inc. v. Ives Laboratories, Inc. (1982) 456 US 844, 72 Led 2d 606, 102 S Ct. 2182 (question of ultimate finding on intent by manufacturer to mislabel in a trademark case is subjected to Rule 52 (a); Daxton Board of Education v. Brinkman, (1979) 443 US 526, 61 LED 2d 720, 99 S Ct. 2971, reh den 444 US 887, 62 LED 2d 121, 100 S Ct. 186 (Rule 52 (a) applies to the ultimate finding of discriminatory intent in school desegregation cases under 14th Amendment); Guzman v. Pichirilo (1962) 369 US 698, 8 LED 2d 205, 82 S Ct. 1095 (Rule 52 (a) applies to the ultimate factual finding of whether there had been a demise charter party in a longshoreman's suit in admiralty).

The position of this Court is clear

that Rule 52 (a) is applicable to a broad category of factual findings. The finding of the district court in the matter Sub Judice is no exception.

In the case Sub Judice, the panel did not apply the clearly-erroneous standard to any of the district court's findings that Perkins' representation of ineligible plaintiffs was properly authorized under legal services corporation regulations and that Perkins was entitled to receive fees arising from that representation. Nor did the panel explicitly mention Rule 52 (a) or explain why, if it was of that view, Rule 52 (a) had no applicability to this issue. This in itself is sufficient for a remand. Dennison Manufacturing Company, Supra. Instead the panel assumed that the district court's ultimate finding was a legal conclusion and proceeded to substitute its view of the ultimate factual issues for that of the district court. This cannot be

done. If the district court's findings are "plausible in light of the record viewed in its entirety," then the panel may not reverse even if it would have decided the dispute differently. Bessemer City, Supra. 84 LED 2d 518, 528.

There is no showing that district court's findings are clearly erroneous, many are uncontradicted and to say the least are plausible in light of the record viewed in its entirety. Therefore, this Court should grant certiorari, vacate the opinion of the panel with orders to reinstate or affirm the decision of the district court.

II. WHETHER EQUITY DEMANDS THAT A FORMER STAFF ATTORNEY BE AWARDED FEES FOR REPRESENTATION OF A CASE ON HIS OWN TIME ON BEHALF OF INELIGIBLE CLIENTS AND PLAINTIFF'S CLASS IN DETRIMENTAL DETRIMENTAL RELIANCE UPON AUTHORIZATION FROM THE PROGRAM PRIOR EXECUTIVE DIRECTORS.

Assuming arguendo that this Court does not vacate the panel's decision, then equity considerations demand that Perkins

be allowed fee for representation of ineligible plaintiffs and plaintiffs' class on his own time in detrimental reliance upon authorization from two prior Executive Directors of NMRLS. It is undisputed that Perkins was given authorization to engage into outside private practice by two prior Executive Directors of NMRLS. It is also undisputed that he was permitted to and did in fact represent the three ineligible plaintiffs and the class.

It is contended the class was certified due to the three named ineligible plaintiffs and that the eligible plaintiff Sammie Chestnut was not an adequate Rule 23 (b) (2) class representative. As Mr. Leonard McClellan, the present Executive Director of NMRLS testified that this case was of a nature and magnitude that it needed leaders like David Jordan and Robert Sims (president and vice president , respectively of the Greenwood Voters League, a political grass root organization) and James Moore, a

leader of the Greenwood Movement, to get the involvement of the Black Community.[3] Mrs. Chestnut, an elderly person in her late seventies or early eighties, was not an active plaintiff in the lawsuit. She died in 1984 before this case was remanded from the Fifth Circuit. Plaintiff Chestnut did not testify or attend the trial in this matter. If the case had to proceed in the name of Chestnut alone then the lawsuit would have been dismissed in 1978 when Perkins assumed responsibility of the case because a lost would have been the inevitable result. The representation of the class was inherently in Perkins' authori-

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[3] Mr. Curley E. Smith (Executive Directorof NMRLS at the time of appeal to the Fifth Circuit) is no longer employed by NMRLS. He resigned under forced resignation in June, 1986, due to the deficit created by his inept management, which is the real issue in this case and the reason why Smith tried to recoup all funds from Perkins. Leonard McClellan, who supported the position of Perkins at the hearing, whose position is unchanged, is now the Executive Director of NMRLS.

zation to represent the three named ineligible plaintiffs who represented the class. So when Perkins spent an estimated 90% of his time at nights, weekends, on Sundays and holidays prosecuting this case, he was performing services for the ineligible plaintiffs and class that was not required on behalf of Sammie Chestnut. This is especially so after 1984 when she was no longer alive.

This Court should give equity considerations to a ruling which penalizes Perkins for his detrimental reliance on authorization by directors, without any fault on behalf of him.

Here, much time was spent by Perkins during and after hours and on off days, away from his family or from other financial sources, performing services on a case that he could have done during the regular work days and hours. Since this is a case of first impression before this Court, any

adverse decision should have applied prospectively only.

This Court should consider the additional factors that there is no authority for NMRLS to represent a class based upon three (3) ineligible plaintiffs and that the decision of the directors in authorizing Perkins to represent the three ineligible clients, who represented the class, probably saved the program from being defunded.

Finally, credence and deference should be given to the decision of Senior District Judge William C. Keady, an eminent and notable judge, who was apprised of the facts and circumstances concerning NMRLS, its practice and former attorneys who obtained fees from NMRLS cases taken with them into private practice. Also, Judge Keady was clearly aware that the sum for attorneys' fees was a negotiable settlement and hours predating the 1982 amendment of Section Two and prior to the remand were

excluded and uncompensated. In view of these considerations and others including Perkins' obligation to finance impact or public interest lawsuits, and the fact that the appeal was without supersedeas, this Court should grant certiorari, and reverse the panel's decision in excluding an award of fee to Perkins during the time he was an employee of NMRLS.

CONCLUSION

In the light of the foregoing reasons, authorities and principles, the Court should grant the petition for writ of certiorari, vacate the panel's decision and reinstate or affirm the decision of the district Court.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

APPENDICES

APPENDIX "A"

District Court Decision & Order

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISION

DAVID JORDAN, et al., Plaintiffs

v. NO. GC77-52-WK

CITY OF GREENWOOD, et al., Defendants

ORDER

The court has for consideration the motion of North Mississippi Rural Legal Services, Inc. [NMRLS] to reconsider its ruling of November 8, 1985, awarding $50,000 as reasonable attorneys' fees and

litigation expenses incurred on behalf of the plaintiff class, and ordering said sum to be distributed as follows:

> $36,000 payable to Willie J. Perkins, Esquire, [Perkins];
>
> $2,000 payable to the joint order of Leonard McClellan, Esquire, [McClellan], and NMRLS;
>
> $2,000 payable to the joint order of Solomon Osborne, Esquire, [Osborne], and NMRLS;
>
> $10,000 payable to NMRLS as reimbursement of litigation expenses.

After entry of judgment, the court, upon the application of NMRLS, stayed disbursement to allow counsel for the parties to submit memoranda on the issues involved. After consideration of briefs of counsel and supplemental affidavits, the court now makes its final ruling.

A brief recitation of the relevant facts is necessary to place the issues in proper prospective. In 1977, a class action on behalf of black plaintiffs was filed against the City of Greenwood challenging the legality of the commission form of city government. From the com-

mencement of the case, David Jordan, Robert Sims and James Moore, black citizens of Greenwood who were gainfully employed and therefore ineligible to be represented by NMRLS, took the lead in the action joined in by Sammie Chestnut, as a named plaintiff and who was an indigent client eligible for NMRLS representation. The attorneys employed by NMRLS were Alix Sanders and Alma Campbell, who filed the original complaint. Later Miss Campbell departed from the scene and Sanders went into private practice.

Perkins, first employed as NMRLS attorney, thereafter participated in the case from 1978 on and filed an amended complaint against the City of Greenwood. This pleading raised issues based upon amended Section 2 of the Voting Rights Act, contending that under the "results tests" no blacks had been elected to the Greenwood city council. Perkins was a long-time personal friend of David Jordan, the lead plaintiff, who was a Greenwood school

teacher. Jordan, Sims and Moore looked to Perkins for guidance in the case.

At different times McClellan, a NMRLS attorney based at Oxford, was involved in representation of Chestnut. His participation consisted mainly of work at the trial level and on appeal to the Fifth Circuit. Osborne, another NMRLS attorney, was involved in the case and actually succeeded Alix Sanders in responsibility. He opened the file on Chestnut and agreed to work jointly with McClellan on behalf of NMRLS and with Perkins, who was representing the ineligible clients. Perkins was primarily responsible for discovery motions, preparing for trial and spent an estimated 90% of his time at nights, weekends and on Sundays and had a basic responsibility for handling the case on appeal to the Fifth Circuit and on all proceedings following remand leading up to a successful conclusion of the case when the court invalidated the commission form of city government based upon the appli-

cation of amended Section 2 principles to the lengthy record presented. The district court first ruled in favor of the City of Greenwood on evidence showing that the commission form of government had not been adopted or maintained on the basis of intentional racial discrimination.

Perkins had an agreement at the outset with Jesse Pennington, [Pennington], and Wilhelm Joseph, [Joseph], successive Executive Directors of NMRLS, that his representation on behalf of Messrs. Jordan, Sims and Moore would be outside practice of law within the meaning of Section 1604.2 (b) of NMRLS regulations. Pennington and Joseph determined that Perkins' handling of the case was not inconsistent with Perkins' full-time responsibilities at NMRLS. It was understood by Pennington, Joseph and Perkins that Perkins had no fee arrangement with Jordan, Sims and Moore, and that Perkins was representing the ineligible clients as a public service to the community. Because of his friendship with

Jordan, and the nature of the litigation, Perkins expected his services to be uncompensated, except that a fee might be ultimately awarded by the court to prevailing parties pursuant to 42 U.S.C. Section 1988. Perkins' actions in this respect may be properly classified as "uncompensated outside practice" under Section 1604.5.

On February 13, 1985, Perkins left the employ of NMRLS and entered into private practice at Greenwood. Following submission of briefs and stipulated record, the court entered an order on July 25, 1984, invalidating the commission form of government and directing that the city submit a plan for the adoption of the mayor-council form of government with 7 councilmen to be elected at wards. After subsequent proceedings, this plan was duly adopted and special elections were ordered to take place in the Spring of 1985. At the conclusion of the case, the court determined that plaintiffs were entitled to

reasonable fees and litigation expenses as prevailing parties. Following settlement negotiations of such costs, Perkins, Osborne and McClellan, representing the plaintiff class, accepted a proposal of $50,000 recommended by the court and paid into the registry of the court by the City Council.

At or about this time, C. Emanuel Smith, [Smith], present Executive Director of NMRLS, was allowed to enter the case. He asserted that NMRLS was entitled to fees and costs that might be awarded and objected to any fee division with Perkins. Prior to Smith's action, Perkins advised that NMRLS would be reimbursed the litigation expenses the agency had advanced to maintain the suit but had no discussion with Smith regarding division of attorneys' fee.

The court notes that Perkins rendered significant service in settlement talks after February 13, 1985, when he was engaged in private practice and no longer

an employee of NMRLS. At the hearing on November 8, 1985, this court determined from uncontradicted evidence that McClellan and Osborne, NMRLS counsel representing the interests of Chestnut, each expended time in the case equal to 5% of the total counsel time, and that Perkins' efforts amounted to 90% of the time and responsibility for managing the litigation.

The court also determined at the hearing, that litigation costs advanced by NMRLS amounted to $10,000, and also that compensable time reasonably invested in the case consisted of around 540 hours, for which compensation should at $75 an hour. After considering all pertinent factors, the court arrived at a fee of $40,000. It was pointed out that the plaintiff class would have recovered no attorneys' fee or expenses except for the change in federal law brought about by amended Section 2 of the Voting Rights Act passed in June, 1982. Perkins, Osborne and McClellan had authority on behalf of the plaintiff class,

which included both eligible and ineligible clients, to enter into the settlement negotiations respecting fee. The City of Greenwood conducted such negotiations in faith and paid $50,000 into the registry of the court, a procedure duly approved by the court.

NMRLS contends that Perkins had no authority under federal law to enter into outside legal practice while he was a full-time employee of NMRLS. In this respect, NMRLS first points to the statute 42 U.S.C. Section 2996(f) (4) which provides that the Legal Services Corporation shall

> (4) insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation.

Pertinent regulations promulgated by the Corporation are as follows:

> Section 1604.1 Purpose.

This part is designed to permit an attorney to comply with the reasonable demands made upon all members of the Bar and officers of the Court, so long as those demands do not hinder fulfillment of the attorney's overriding responsibility to serve those eligible for assistance under the Act.

Section 1604.2 Definitions.

(a) "Attorney", as used in this part, means a person who is employed full time in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered.

(b) "Outside practice of law" means the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, consulting, or performing evaluation.

Section 1604.3 General Policy.

No attorney shall engage in any outside practice of law if the director of the recipient has determined that such practice is inconsistent with the attorney's full time responsibilities.

Section 1604.4 Compensated outside practice.

A recipient may permit an attorney to engage in the outside practice of law for compensation if Section 1604.3 is satisfied, and

(a) The attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible; or

(b) The attorney is acting pursuant

to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction, and remits to the recipient all compensation received.

Section 1604.5 Uncompensated outside practice.

A recipient may permit an attorney to engage in uncompensated outside practice of law if Section 1604.3 is satisfied, and the attorney is acting:

(a) Pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction; or on behalf of;

(b) A close friend or family member; or

(c) A religious, community, or charitable group.

The court finds that the contentions of NMRLS are not borne out by the established record and findings in this case. In the first place, it is clear that the lead plaintiffs, Jordan, Sims and Moore, were ineligible clients and could not be represented by NMRLS. Only the indigent Chestnut was eligible. It is also clear that Perkins was permitted by the Executive Directors of the NMRLS to represent Jordan, Sims and Moore as outside practice, and that Perkins had no contractual arrangement with Jordan, Sims and Moore for payment for

his services, and that he acted out of friendship and on behalf of the local public interest. Moreover, no compensation was agreed to be paid Perkins by anyone. Only in the event the litigation was successful would plaintiff class be entitled to a fee award against the City of Greenwood for professional services rendered by counsel. The actions of Pennington and Joseph, as Executive Directors of NMRLS, in agreeing that Perkins might enter the Jordan case on such conditions confirm that the engagement was to be "uncompensated outside practice," their actions were authorized by regulations and are binding upon NMRLS.

NMRLS argues that the case of Dubose v. Pierce, 579 F. Suppl. (D.C. Conn. 1984), supports their position. In that case it was held that a Legal Services attorney who handled litigation involving the failure of the Department of Human and Urban Develop-

ment to implement federal operating subsidiary housing program and then left the employ of Legal Services, being permitted to "take the case with him" and continuing to work on other employment, was not entitled to an attorney's fee award unde the Equal Access To Justice Act. Judge Blumingfeld held, with respect to 42 U.S.C. Section 2996(f) (a) (4), that "[t]he statute is clear, compensated outside practice is prohibited; uncompensated outside practice is permitted only as authorized by the Corporation." The court noted, however, that the House Report accompanying the legislation recognized that while "attorneys" employed full time in Legal Services activities paid for by the Corporation will be prohibited from engaging in any outside practice of law for compensation, "[i]t is expected that such attorneys, however, will be permitted to handle uncompensated legal work for their families, church groups, community organi-

zations , and other parties so long as their uncompensated work does not interfere with their responsibilities to provide first-rate legal assistance to the poor in accordance with this bill." H.R.-Rep. No. 247, 93 Cong., 2nd Session, reprinted in 1974 U.S. Code Cong. & Ad. News 3872, 3880, Dubose, 579 F.-Supp. 962.

The Dubose case is inapposite for several reasons. First, the clients in Dubose were indigent and eligible to receive legal service. Here, Jordan, Sims and Moore were not. Second, the parties in Dubose admitted that the case involved compensated practice; here private plaintiffs Jordan, Sims and Moore had no obligation to pay Perkins and made no payment to him during the pendency of the lawsuit. Third, the attorney in the Dubose case taking the case with him after leaving Legal Serivces had no agreement that the case from its inception might be

handled by him in his individual capacity out of friendship for persons who were ineligible clients. Fourth, the recovery in Dubose netted a settlement fund designed to reimburse the eligible clients as nearly as practicable for amounts which should have been paid by HUD as operating subsidiary and that public policy precluded divesting any part of the settlement fund to pay attorneys' fees. In contrast, plaintiffs in the present action did not seek damages but injunctive and declaratory relief against the commission form of government. Thus, the request for attorneys' fees was ancillary to the action for equitable, but non-pecuniary relief. Lastly, some portion of work done by Perkins was performed after he terminated his employment with NMRLS pursuant to an understanding that the Jordan case was and had been from the beginning his individual responsibility.

Smith, the current Executive Director

of NMRLS, has held such position since January, 1984. He had no participation in the case until shortly before filing a motion for fees and expenses on behalf of NMRLS.

Because of the special facts and circumstances of this case the court concludes that attorney Perkins is entitled to be compensated for the work done on behalf of Jordan, Sims and Moore, and that his being allowed same does not conflict with either the federal statute or pertinent regulations adopted by the Legal Services Corporation. Moreover, the legal work performed by the staff attorneys for NMRLS in this case is properly recognized by the fee allowances to McClellan and Osborne. These sums will, of course, be returned to NMRLS along with $10,000 to cover expenses advanced to maintain the suit.

For these reasons the motion of NMRLS to reconsider the court's prior judgment

herein is DENIED.

The Clerk of this Court is authorized to distribute the amount of $50,000 heretofore paid into the registry by the City of Greenwood in accordance with its prior judgment dated November 8, 1985, unless NMRLS shall, within 10 days from this date, post a supersedeas bond of $60,000, with good and sufficient sureties, conditioned according to law, to pay the amount of the judgment with 8% interest per annum thereon, and all costs in event the action of this court is affirmed.

THIS, the 12th day of December, 1985.

/s/ William C. Keady
United States District Judge

APPENDIX "B"
Fifth Circuit Opinion

David JORDAN, et al.,
Plaintiffs-Appellees,

v.

CITY OF GREENWOOD, MISSISSIPPI,
etc., et al., Defendants-Appellees,

v.

NORTH MISSISSIPPI RURAL LEGAL
SERVICES, INC., Movant-Appellant.

No. 86-4001

United States Court of Appeals,
Fifth Circuit.

Feb.2, 1987.

In class action brought under the Voting Rights Act, the United States District Court for the Northern District of Mississippi, William C. Keady, Jr., awarded most of attorney fees to legal service corporation's former staff attorney, personally. On appeal, the Court of Appeals, Johnson, Circuit Judge, held that: (1) representation of both eligible and ineligible plaintiffs was not "uncompensated" within meaning of regulation authorizing staff attorneys for legal service corporations to perform certain uncompensated work, and thus, any agreement between attorney and legal service corporation authorizing attorney to work on case "outside practice" was invalid, and (2) attorney was not personally entitled to any fee for work performed while employed by

corporation, and legal service corporation was entitled to entire award except for portion for services performed by staff attorney after he left position with corporation.

Reversed and remanded.

1. Civil Rights West Key 13.17(21)

Legal services organizations are entitled to attorney fee awards under civil rights attorney fee statute to the same extent as private counsel; such fees usually are awarded to organization itself and not to salaried staff attorneys involved in case. 42 U.S.C.A. Section 1988.

2. Corporations West Key 377 1/2

Regulation permitting uncompensated outside practice by staff attorneys for legal service corporation under certain circumstances does not encompass any fee-generating work, even if fee is contingent on successfully prosecuting case; outside practice is "compensated" within meaning of Legal Services Corporation Act of 1974, Section 1001 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. CORPORATIONS West Key 377 1/2

Legal service corporation's former staff attorney's representation of both eligible and ineligible plaintiffs in class action suit under Voting Rights Act, resulting in $50,000 award, was not "uncompensated" within meaning of regulation authorizing staff attorneys for legal service corporations to perform certain

uncompensated work, and thus, any agreement between attorney and legal service corporation authorizing attorney to work on case "outside practice" was invalid. Fed.Rules Civ.Proc. Rule 23(b)(2), 28 U.S.C.A.; Voting Rights Act of 1965, Section 2 et seq., as amended, 42 U.S.C.A. Section 1973 et seq.; Legal Services Corporation Act of 1974, Section 101 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Corporations** West Key 377 1/2

Former staff attorney for legal service corporation was not personally entitled to any fee awarded for services rendered on behalf of class, in Voting Rights Act suit, while attorney was employed by corporation, and legal service corporation was entitled to entire award except for portion for services perfomed by staff attorney after he left position with corporation, absent any showing by staff attorney that he took any action on behalf of ineligible plaintiffs that was not also required in representing plaintiff who was eligible to be represented under the Legal Services Corporation Act. Fed.Rules Civ. Proc.Rule 23(b)(2), 28 U.S.C.A.; Voting Rights Act of 1965, Section 2 et seq., as amended, 42 U.S.C.A. Section 1973 et seq.; Legal Services Corporation Act of 1974, Section 1001 et seq., as amended, 42 U.S.C.A. Section 2996 et seq.; 42 U.S.C.A. Section 1988.

Appeal from the United States District Court for the Northern District of Mis-

sissippi.

Before RANDALL, JOHNSON, and JONES, Circuit Judges.

JOHNSON, Circuit Judge:

This class action, initiated in 1977, has succeeded in restructing the city government of Greenwood, Mississippi. All that remains is to divide the attorneys' fees awarded pursuant to 42 U.S.C. Section 1988. The claimants are the attorney primarily responsible for the case, Willie Perkins, and his former employer North Mississippi Rural Legal Services, Inc. (NMRLS). We agree with NMRLS that the district court erred in awarding most of the fees to Perkins.

I. BACKGROUND

On May 6, 1977, four members of the Greenwood Voters League filed a class action against the City of Greenwood, Mississippi. The action, filed on behalf of all black residents of Greenwood, challenged the legality of Greenwood's commission form of government under section 2 of the Voting Rights Act, 42 U.S.C. Section 1973. One of the named plaintiffs, Sammie Chestnut, was indigent and therefore eligible for representation by NMRLS, a public legal services corporation funded pursuant to the Legal Services Corporation Act of 1974, 42 U.S.C. Section 2996. The remaining named plaintiffs were not eligible for NMRLS representation and thus were represented by private counsel.

At the outset of the litigation, NMRLS attorneys worked together with private counsel.[1]

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1. Regulations governing the Legal Services Corporation expressly permit

The class complaint, for example, was filed jointly by private counsel and NMRLS attorneys. Similarly, private and public attorneys acting together obtained an order on November 15, 1977, certifying the case as a Rule 23(b)(2) class action. Soon thereafter, however, private counsel reached a strategy impass with the named plaintiffs and withdrew from the case. From that point forward, NMRLS attorneys alone acted on behalf of the class.

After the class had been certified, NMRLS hired Willie Perkins as a full-time salaried staff attorney. Perkins became active in the Greenwood litigation, eventually assuming primary responsibility for the case. In addition to representing the eligible named plaintiff, Sammie Chestnut, Perkins obtained permission from the executive director of NMRLS to represent the ineligible plaintiffs, whose private counsel had earlier withdrawn from the case. Perkins agreed to represent the ineligible plaintiffs on his own time and without any fee arrangement. NMRLS in turn continued to fully finance the litigation and provide necessary facilities and support services.

Perkins, with the assistance of other NMRLS attorneys, was eventually successful in overturning Greenwood's at-large commission form of government. [2]

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1. Con't.
such joint efforts between legal service attorneys and private counsel. See 45 C.R.R. Section 1609.8(c) (1985).

2. The litigation was not without setbacks for the plaintiff class. Following trial of the case in October of 1980, the district court entered judgment in favor of Greenwood finding that plaintiffs

On December 5, 1984, the district court entered a final judgment in favor of plaintiffs and approving a plan submitted by Greenwood that called for election of city commissioners from single-member districts.

All that remained was to determine the reasonable attorneys' fees and costs to be awarded pursuant to 42 U.S.C. Section 1988. In its final judgment, the district court directed the parties to negotiate a settlement of the attorneys' fee question. Before any such agreement was reached, however, Perkins resigned from his position with NMRLS and went into private practice.[3] Perkins nevertheless continued working on the case and eventually negotiated a $50,000 settlement. The district court approved of that settlement in an order entered on October 31, 1985.

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2. Con't.
had failed to demonstrate that Greenwood's at-large commission form of government was established or maintianed for a discriminatory purpose. On appeal, a panel noted that three months after the district court announced its decision, section 2 of the Voting Rights Act was amended to outlaw any voting practice that "results in" a denial or abridgement of the right to vote on account of race or color. Id. at 668. The panel remanded the case to the district court for reconsideration in light of the amendment to section 2. Id. at 670. It was only on remand that plaintiffs eventually prevailed.

3. The parties disagree on the date Perkins left his job with NMRLS. Perkins says that he left on February 13, 1985. NMRLS counters that Perkins did not leave

In the meantime, NMRLS, acting as counsel for the prevailing class, filed a motion for assessment of attorneys' fees and costs. What ensued is the instant dispute regarding the proper distribution of attorneys' fees. Perkins argues that he personally is entitled to the bulk of the fees, relying on his agreement with past executive directors of NMRLS authorizing him while in the employ of NMRLS to represent the ineligible named plaintiffs on his own time.

The district court agreed. Following a hearing, the district court awarded $36,000 in fees to Perkins. The district court awarded the remaining $14,000 to NMRLS, $10,000 in reimbursement for litigation expenses and $4,000 for time spent on the case by NMRLS attorneys. The district court found that Perkins had agreed to represent the ineligible named plaintiffs on his own time as a public service to the community. The court further found that because of his friendship with one of the ineligible plaintiffs, Perkins expected his services to be uncompensated, except that a fee might ultimately be awarded to the prevailing party pursuant to 42 U.S.C. Section 1988. The district court concluded that Perkins' representation of ineligible plaintiffs in this case was properly authorized under Legal Services Corporation Regulations and that Perkins was entitled to receive any fees arising form that representation.

NMRLS appeals contending that as counsel of record for the prevailing class, it should receive any fees awarded for

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3. Con't.
until March 15, 1985. The district court's resolution of this factual dispute in favor of Perkins is not challenged on appeal.

services rendered by its staff attorneys, including Willie Perkins. NMRLS argues that any agreement to the contrary between Perkins and prior NMRLS executive directors is invalid under applicable regulations. We agree.

II. DISCUSSION

[1] Legal services organizations are entitled to attorneys' fees awards under 42 U.S.C. Section 1988 to the same extent as private counsel. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 1547, 79 LEd.2d 891 (1984) (whether plaintiff is represented by private counsel or a nonprofit legal organization does not impact section 1988 fee award); Watkins v. Mobile Housing Board, 632 F.2d 565, 567 (5th Cir.1980). In the usual case, such fees are awarded to the organization itself and not to the salaried staff attorneys involved in the case. See, e.g., Hamilton v. Daley, 777 F.2d 1207, 1213 (7th Cir.1985); Dubose v. Pierce, 579 F.Supp. 937, 963 (D.Conn. 1984), rev'd on other grounds, 761 F.2d 913 (2d Cir.1985) (for legal services attorneys personal rewards of clients' victories limited to knowledge that rights of poor people vindicated).

Perkins argues that the instant case requires a different result. According to Perkins, the Legal Services Corporation Act ("Act") prohibited NMRLS from representing the three ineligible named plaintiffs.[4]

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4. Perkins correctly points out that the Act only authorizes the representation of eligible clients. 42 U.S.C. Section 2996f(a)(1) and (a)(2)(A). These provisions do not, however, prohibit representation and funding of a class action where one

Because their private attorney had withdrawn from the case, Perkins agreed to represent the ineligible plaintiffs as private counsel and on his own time. Perkins asserts that the nature of the litigation and his friendship with one of the ineligible named plaintiffs persuaded Perkins to work on the case without a fee arrangement. Perkins argues that such "uncompensated outside practice of law" was properly authorized under the Act and regulations promulgated thereunder.

The Act prohibits a full-time services attorney from engaging in any compensated or uncompensated outside practice of law, except as authorized in regulations promulgated by the Legal Services Corporation. 42 U.S.C. Section 2996f(a)(4).[5]

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4. Con't.
named plaintiff is eligible and the other are not. Our review of the Act and regulations reveals no clear answer regarding NMRLS's ability to represent the class in such an instance. We note, however, that the regulations expressly approve of "class action litigation when appropriate to provide effective representation to a client or a group of similarly situated clients; ..." 45 C.F.R. Section 1617,4(a) (1985). Nevertheless, the question was not raised during the course of this litigation and is not before this Court.

5. Section 2996f(a)(4) provides that: With respect to grants or contracts in connection with the provision of legal assistance to eligible clients under this subchapter, the Corporation shall----
....
(4) insure that attorneys employed full time in legal assistance activities

The relevant regulation permits compensated outside practice only if:

(a) The attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as possible; or

(b) The attorney is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction, and remits to the recipient all compensation received.

45 C.F.R. Section 1604.4 (1985). It is apparent that neither of these circumstances exists in the instant case.[6]

Perkins relies instead on 45 C.F.R. Section 1604.5 (1985) which regulates "uncompensated outside practice of law." Regulation 1604.5 permits uncompensated outside practice only if the attorney is acting

(a) Pursuant to an appointment made under a court rule or practice of equal applicability to al attorneys in the jurisdiction; or on behalf of;

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5. Con't.
supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation; ...

6. Section 2996f(a)(4) of the Act may be read to absolutely prohibit compensated outside practice. The Legal Services Corporation has not, however, adopted such an interpretation. Instead, the Corporation

(b) A close friend or family member; or

(c) A religious, community, or charitable group.

In particular, Perkins relies on regulation 1604.5(b) which authorizes uncompensated outside practice on behalf of a close friend, in this case one of the ineligible named plaintiffs.

Perkins argues that his representation here was "uncompensated" because the fee award was contingent on success. This argument, however, ignores the fact that contingent fees are a common means of compensation in the legal profession. That the contingent fee was awarded pursuant to statute rather than agreement between attorney and client makes no difference. Private civil rights practitioners finance much of their practice on fee awards to the prevailing party pursuant to 42 U.S.C. Section 1988.

Perkins' argument is also at odds with the express justification for limiting the outside practice of legal services attorneys. The Act and regulations seek to focus the energy and dedication of legal services attorneys on their overriding responsibility to assist eligible clients. 45 C.F.R. Section 1604.1 (1985). Outside practice is thus limited to matters either highly unlikely to interfere with that responsibility or necessary to fulfill the

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6. Con't.
has determined to permit two narrow categories of compensated outside practice Because neither category is involved in the instant case, we need not determine whether the Corporation's interpretation of section 2996f(a)(4) is correct.

attorneys' professional obligations. Regulation 1604.5, for example permits legal services attorneys to fulfill their ethical obligation to accept court appointments and provide pro bono service. It also permits legal services attorneys to provide minor assistance to close friends and family members. Matters involving compensation, in contrast, whether contingent or not, are by nature far more likely to conflict with legal service attorneys' responsibility to eligible clients.

[2,3] We conclude, therefore, that regulation 1604.5 does not encompass any fee-generating work, even if the fee is contingent on successfully prosecuting a case. Outside practice is "compensated" within the meaning of the Act and regulations if it reasonably may be expected to result in a fee for legal services. Perkins' representation in the instant class action resulting in a $50,000 award was clearly not "uncompensated" within the

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7. This definition of compensated practice is consistent with the definition of fee-generating practice contained in the regulations. Regulation 1609.2 defines fee-generating practice as

> any case or matter which ... reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.45 C.F.R. Section 1609.2 (1985). Cases where the possibility exists, if successful, of an award under 42 U.S.C. Section 1988 clearly fall within this definition.

meaning of regulation 1604.5.[8] Because it was not, any agreement between Perkins and former NMRLS directors authorizing him to work on the case as "outside practice" is invalid.

[4] Finally, we disagree with any suggestion by Perkins that NMRLS has no proper claim to the fees awarded in this case. NMRLS staff attorneys were counsel of record throughout the course of this litigation. Perkins himself, in his notice of appearance and subsequent filings in the district court, listed his status as a NMRLS attorney. Once the district court entered its Rule 23(b) class certification order, which occurred several months before Perkins was employed, NMRLS's ethical obligations to its eligible client required it to pursue interests which were shared by the class as a whole. Perkins has failed to identify any action that he took on behalf of the ineligible named plaintiffs which was not also required in representing his eligible client, Sammie Chestnut.

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8. Perkins mistakenly relies on the clearly erroneous standard of review. The district court's conclusion that Perkins' representation of the ineligible named plaintiffs was "uncompensated outside practice" was a legal conclusion subject to de novo review on appeal. The district court found, for example, that former NMRLS directors had authorized Perkins' representation of the ineligible plaintiffs. The district court also found that one of the ineligible plaintiffs was a personal friend of Perkins. Only these predicate factual findings, which are not challenged in this appeal, would be subject to the clearly erroneous standard of review.

III. CONCLUSION

We conclude, therefore, that the district court erred in awarding most of the attorneys' fees to Perkins personally. Perkins is not personally entitled to any fee award for services rendered on behalf of the class while he was employed by NMRLS. The parties agree, however, that Perkins is entitled to personal compensation for services provided on behalf of the class after he left his position with NMRLS. See also Shadis v. Beal, 692 F.2d 924 (3d Cir.1982) (Former legal services attorney personally entitled to fee award for services rendered to the class following termination of her employment with legal services.). The case is remanded to the district court to determine the extend, if any, of that compensation.

REVERSED AND REMANDED.

APPENDIX "C"
Fifth Circuit Opinion on Rehearing

No. 86-4001

DAVID JORDAN, ET AL.,

Plaintiffs-Appellees

versus

CITY OF GREENWOOD, MISSISSIPPI, Etc., ET AL.,
Defendants-Appellees,

versus

NORTH MISSISSIPPI RURAL LEGAL SERVICES, INC.,

Movant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion_____, 5 Cir., 189__, ____ F.2d____)

(March 6, 1987)

Before RANDALL, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

CLERKS'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX "D"
Statutes and Regulations Involved

Rule 52, FRCP. (Findings by the Court.)

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motion under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

45 CFR Part 1604 - (Outside Practice of Law)

Section 1604.1 Purpose.

This part is designed to permit an attorney to comply with the reasonable demands made upon all members of the Bar and officers of the Court, so long as those

demands do not hinder fulfillment of the attorney's overriding responsibility to serve those eligible for assistance under the Act.

Section 1604.2 Definitions.

(a) "Attorney", as used in this part, means a person who is employed full time in legal assistance activities supported in major part by the Corporation, and who is authorized to practice law in the jurisdiction where assistance is rendered.

(b) "Outside practice of law", means the provision of legal assistance to a client who is not entitled to receive legal assistance from the employer of the attorney rendering assistance, but does not include, among other activities, teaching, consulting, or performing evaluation.

Section 1604.3 General Policy.

No attorney shall engage in any outside practice of law if the director of the recipient has determined that such practice is inconsistent with the attorney's full time responsibilities.

Section 1604.4 Compensated outside practice.

A recipient may permit an attorney to engage in the outside practice of law for compensation if Section 1604.3 is satisfied, and

(a) The attorney is newly employed and has a professional responsibility to close cases from a previous law practice, and does so as expeditiously as

possible; or

(b) The attorney is acting pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction, and remits to the recipient all compensation received.

Section 1604.5 Uncompensated outside practice.

A recipient may permit an attorney to engage in uncompensated outside practice of law if Section 1604.3 is satisfied, and the attorney is acting:

(a) Pursuant to an appointment made under a court rule or practice of equal applicability to all attorneys in the jurisdiction; or on behalf of;

(b) A close friend or family member; or

(c) A religious, community, or charitable group.

45 CFR Section 1611.3 (Maximum Income Level)

Section 1611.3(d) Unless authorized by Section 1611.4 no person whose income exceeds the maximum annual income level established by a recipient shall be eligible for legal assistance under the Act.